1988

State of Utah v. Richard Warenski : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff-Respondent, vs. RICHARD WARENSKI, Defendant-Appellant.	Case No. 880293-CA Category No. 2

BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM A CONVICTION OF CULTIVATION OF MARIJUANA, A THIRD DEGREE FELONY, IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE RAY M. HARDING, JUDGE, PRESIDING.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff-Respondent, vs. RICHARD WARENSKI, Defendant-Appellant.	Case No. 880293-CA Category No. 2

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Section 78-2a-3(2)(e), Utah Code Annotated 1987-88.

NATURE OF PROCEEDINGS

Defendant appeals his conviction for a third degree felony, cultivation of marijuana, Section 58-37-8(1)(a), Utah Code Annotated, 1953, as amended. Defendant entered a plea of not guilty to the information and was found guilty by a jury on March 31, 1988 and was sentenced on April 29, 1988. A Notice of Appeal was filed on May 3, 1988.

STATEMENT OF ISSUES PRESENTED ON APPEAL

I. DID THE TRIAL COURT ERR IN FAILING TO GRANT DEFENDANT'S MOTION TO DISMISS THE STATE'S INFORMATION, MADE AT THE CONCLUSION OF THE STATE'S CASE IN CHIEF AND AT THE CONCLUSION OF THE TRIAL?

II. IS THERE SUFFICIENT EVIDENCE TO SUSTAIN THE VERDICT OF

GUILTY?

III. SHOULD DEFENDANT'S CONVICTION BE REVERSED AS A MATTER OF LAW?

STATUTES

Section 58-37-8(1)(a), Utah Code Annotated, 1953, as amended.

STATEMENT OF THE CASE

On September 9, 1987, an Information was issued against the defendant, Rick Warenski, charging him with cultivation of marijuana in violation of Section 58-37-8(1)(a), Utah Criminal Code, as amended. It alleged that on or about September 8, 1987, the defendant, Rick Warenski, did knowingly and intentionally produce a controlled substance, to wit: marijuana. On September 8, 1987, Officer Larry Patterson of the Utah County Sheriff's Department, a trained pilot, flew an aircraft in the Utah County area. He had with him Sergeant Alex Hunt and Sergeant Jens Horn of the Utah County Sheriff's Department. (Tr. 168-169). These officers were searching for marijuana. In the Salem area of Utah County, the officers spotted what they described as approximately 100 six to eight foot tall marijuana plants. (Tr. 170). No persons were spotted on the property by the officers while observing from the airplane. Immediately after the alleged marijuana was spotted, the officers landed the airplane and

approximately 1 1/2 hours later arrived at the location where the marijuana was believed to be growing. (Tr. 171). Officer Larry Patterson went to a neighbor's house north of the suspect property and undertook surveillance from that location approximately 1/2 block away from the suspect property. Officer Patterson observed with his naked eye only. (Tr. 172-173). While waiting for officers to arrive with a search warrant to conduct a search of the premises, Officer Patterson observed the defendant Warenski outside of a home located on the property and a shed located on the property. Officer Patterson described the shed as part of a enclosed area where the marijuana was growing. The enclosed area consisted of a shed or building, a mobile home and two walls constructed with bales of hay. Officer Patterson did not see defendant Warenski enter into the marijuana enclosure. (Tr. 169-170, 174). After the officers with the search warrant arrived, Officer Patterson went over to the marijuana enclosure, climbed one of the haystack walls and looked into the enclosure. As he did so he saw defendant Warenski on the opposite corner of the enclosure with his back toward Officer Patterson. Defendant Warenski was near and facing a shower stall and tub with water in it and appeared to be doing something with hoses. However, when defendant Warenski was alerted to the presence of Officer Patterson, he turned around and his hands contained no objects. (Tr. 176, 195)

Defendant Warenski was placed under arrest and transported to the Utah County Jail. Defendant Warenski did not reside at the property where the marijuana was growing, the same being owned and occupied by co-defendants, Richard Miranda and Terry Miranda. Defendant Warenski was and is a resident of the city of Pleasant Grove, a city located approximately 20 miles north of Salem. (Tr. 268-269). Richard and Terry Miranda, after being advised of their Miranda Rights, made statements to officers of the Utah County Sheriff's Department and admitted that they had cultivated the marijuana, were very proud of it, that it was very beautiful and had a value of approximately $200,000.00. (Tr. 244 -248). Richard and Terry Miranda also explained to officers the process employed by them in setting up and caring for the marijuana garden. They also explained the expense of so doing. (Tr. 262-263, 265).

Defendant Rick Warenski made no statements to the police and was not observed inside the residence of Richard and Terry Miranda at any time.

At the conclusion of the State's case, counsel for the defendant Rick Warenski made a motion to dismiss the information against Rick Warenski upon the grounds and for the reasons that defendant Warenski had been found in a place where marijuana was growing, but there was no evidence whatsoever that he was cultivating the same or had anything to do with the cultivation

thereof. Counsel cited cases to the court and argued the matter. The motion was taken under advisement and the case proceeded to the jury. (Tr. 270-274). Counsel for the defendant Rick Warenski renewed the motion to dismiss at the conclusion of the trial prior to the court's reading of jury instructions and submitting the case to the jury. Again the court took the motion under advisement. (Tr. 276). The case was submitted to the jury and verdicts of guilty were returned against all three defendants.

SUMMARY OF ARGUMENT

The facts viewed in the light most favorable to the prosecution's case indicate only, that the defendant, Rick Warenski, was found to be present where marijuana was being grown, stooping at or near a shower stall with water in the tub portion, doing some undetermined act. Mr. Warenski had only been in the area where the marijuana was grown for a short period of time before being confronted, and had gained entry through a concealed doorway. The evidence, taken as a whole at best, might support a charge that defendant Warenski was in possession of marijuana. The Utah Supreme Court has held that possession alone is insufficient to show that the accused cultivated or produced the substance. Defendant Warenski's conviction should be reversed and an order entered dismissing the information.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT WARENSKI'S MOTION TO DISMISS THE STATE'S INFORMATION, WHICH MOTION WAS MADE AT THE CONCLUSION OF THE STATE'S CASE IN CHIEF AND AT THE CONCLUSION OF THE TRIAL.

Section 58-37-8(1)(A)(a)(i) provides as follows:

> Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally produce, manufacture or dispense, or to possess with intent to produce, manufacture or dispense, a controlled or counterfeit substance.

Defendant Warenski was charged with violations of the above quoted section of the Utah Controlled Substances Act. The Supreme Court of the State of Utah, has interpreted this statute in a number of cases involving facts very similar to if not exactly on point with the facts of this case. The first such case is that of State v. Schroff, 514 P.2d 793, (Utah 1973). In Schroff, one LaVar Brachen discovered that in one of his fields someone was cultivating two small patches of plants which he suspected were marijuana. The Sheriff of Washington County was notified and on the same day the sheriff and Brachen made an examination of the areas. The plants were growing on high ground and were not watered by irrigation of the other farming areas. Depressions had been made adjacent to the plants and the ground surrounding the plants was moist. Buckets and jugs were found near a creek which was a short distance from the areas above-mentioned. Footprints led from the areas to the creek. The

areas were placed under surveillance by the sheriff's department. On August 2, 1972, the defendant was observed crossing one of the fields near the areas where the marijuana was growing. On August 8, 1972, the defendant was observed picking leaves from one of the plants and placing them in a plastic bread wrapper sack. The defendant was placed under arrest and charged with the offense of cultivation of marijuana in violation of Section 58-37-8(1)(A)(a)(i), Utah Code Annotated. While in custody the defendant made essentially the following statement to the arresting officers: "Why didn't we go catch some of these junkies that are peddling dope and leave us with our marijuana alone?" The defendant was convicted by jury verdict after trial and appealed his conviction claiming that the evidence was insufficient to support the charge of cultivation of marijuana. The Supreme Court agreed with the defendant and stated:

> The evidence taken as a whole would only support a charge that the defendant was in possession of marijuana. Possession alone is insufficient to show that the defendant cultivated or produced the substance. We conclude that the defendant's conviction must be reversed and it is ordered that the Information be dismissed.

In 1983, the Court decided the case of State v. Anderton, 668 P.2d 1258 (Utah 1983). In Anderton, Carl L. and Lana G. Anderton, husband and wife, were convicted of the offenses of possession of marijuana with intent to distribute for value and production of marijuana. The case was tried to the Court. The

facts which were either stipulated or proven were that both of the defendants owned and resided in the residence searched by officers of the Roosevelt Police Department pursuant to a search warrant. The search produced the following: three planters with four marijuana plants growing in them; one brown paper bag containing two plastic bags each of marijuana; one plastic bag containing 7.8 ounces of marijuana; one plastic bag containing 4.1 ounces of marijuana; one brown paper bag which contained eight smaller plastic bags of marijuana, each of the smaller bags being approximately one ounce; one foil wrapped chunk of "hash" weighing 10.2 grams; one plastic bag of green plant material; one film canister of green plant material; two packages of cigarette rolling papers. At the time of arrest, Mr. Anderton, stated: "My wife doesn't know anything about this. I just came home with everything." Evidence at the trial indicated that a confidential informant had "personally observed the substance in question." The Andertons appealed their convictions and challenged the sufficiency of the affidavit in support of the search warrant. In addition, Mrs. Anderton, contended that the evidence was insufficient to convict her of the crimes charged. On this latter issue, the author of the opinion for the Supreme Court, Chief Justice Hall, concluded:

> Viewing the evidence in the light most favorable to the judgment of the trial court as we are obliged to do, this writer concludes that it adequately supports the conviction of both defendants. The quantity of

> marijuana and hashish, which included live marijuana plants, was too large for personal consumption, and it was found in the defendants' home, which they owned and resided in as husband and wife.
>
> It was reasonable for the trial court to infer from the attendant facts and circumstances that contraband, particularly the potted plants of marijuana was in plain view.

The majority of the court reached a different conclusion and reversed the conviction of defendant Lana G. Anderton. Supporting its conclusion, the majority stated:

> ...There is no evidence in the record which shows Lana Anderton's knowing or intentional involvement in the production of marijuana. The only evidence is that of joint residence in the home where the plants were found. There is nothing to establish how long the plants had been there or where they were found. When the facts of this case are considered, particularly in light of the cases cited above, it requires a "leap of faith," to find that Lana Anderton is guilty solely on the basis of her marital relationship with her husband and their joint occupancy of the home.

The reasoning of State v. Anderton was followed by the Supreme Court in State v. Fox, 709 P.2d 316 (Utah 1985). In Fox, the Weber County Sheriff's Office received an anonymous letter stating that seven-foot marijuana plants were growing at 249 Harris Street in Ogden, Utah. The residence belonged to Gary Fox. Acting on the tip, an officer went to the residence to investigate. He saw that the yard contained two opaque greenhouses, one of which was attached to the house. The officer could observe marijuana in the greenhouses and obtained a search warrant for the house and greenhouses. The home had two bedrooms. One bedroom contained men's clothing, carpentry tools,

and a plastic identification card for Clive Fox. The second bedroom contained men's clothing, women's underclothing, a checkbook and bank deposit slips with Gary Fox's name on them, a book entitled "Marijuana Grower's Guide", and marijuana and drug paraphernalia. The kitchen contained marijuana and other paraphernalia. Both greenhouses contained marijuana plants. One of the greenhouses was accessible from the kitchen and had no outside entrance. The kitchen and greenhouse were not blocked off or separated from the remainder of the house and the entire house was very humid. There were items of mail addressed to both Gary and Clive found in the house. Gary owned the property. The telephone listing was in Clive's name and had been for four years. The police did not see either Gary or Clive at the house but a neighbor testified that he had seen both of them there. At the close of the State's case, both defendant's moved to dismiss the charges because of insufficient evidence. The motion was denied. Both were convicted of production of a controlled substance and possession of a controlled substance with intent to distribute for value. The Supreme Court affirmed the conviction of Gary Fox and reversed the conviction of Clive Fox. Following the Anderton reasoning, the Court stated the following:

> Because one of the greenhouses was attached to the house and was openly accessible from the kitchen, the trier of fact could reasonably find that Clive Fox knew that marijuana was being grown in the house. However, to prove that he had constructive possession of the marijuana, the evidence must also show that he had the

> power and intent to exercise dominion or control over the marijuana. There is no evidence that Clive Fox had any intent to grow or to possess the marijuana in the greenhouses. While he may have had knowledge of the existence of marijuana on the premises, that is not the equivalent of constructive possession.

In the cases just reviewed, the facts showed that all of the defendants were in close proximity to and had a knowledge of the presence of marijuana or other contraband substances. In two of the cases, the defendants resided in the location where the marijuana or contraband substances were found. In this case, defendant Warenski was found present where marijuana was growing but the defendant resided 20 miles away from the property where the marijuana was growing. Apparently the defendant had only been in the area where the marijuana was growing for a few minutes before confronted by the deputies of the Utah County Sheriff's Department. No other evidence suggested that defendant Warenski had any other connection or tie with the property. On the other hand the facts clearly show that the property was owned and resided in by Richard and Terri Miranda. Several marijuana plants were found in a harvested condition inside the home along with other paraphernalia and books giving instructions on how to grow marijuana. Further, the evidence clearly shows that both Terri and Richard Miranda acknowledged that they were growing the marijuana, were proud of the marijuana, knew the value of the marijuana and the investment into the production of the marijuana. The Mirandas did not implicate defendant Warenski in

the cultivation or production of marijuana. The mere fact that defendant Warenski was standing with his back to the officer as he entered into the area where the marijuana was growing and that he was facing a shower stall containing water in the tub portion of it and doing something which the officer could not determine, is not sufficient evidence to form a nexus between defendant Warenski and the marijuana to suggest or cause a conclusion that he was producing or participating in the production of marijuana. At the very most, defendant Warenski knew that marijuana was growing here. Based upon the facts of this case, and the rulings of the Supreme Court in the cases heretofore cited, defendant Warenski, contends that the trial court erred in denying his motion to dismiss and that the case should be reversed and the information should be dismissed.

POINT II

THE PROSECUTION'S EVIDENCE IS INSUFFICIENT TO SUSTAIN A VERDICT OF GUILTY.

The arguments supporting this point are the same as or closely related to those which have been made by defendant in support of his argument under Point I. In the interest of brevity and to avoid cumulative argument, counsel and defendant simply elect to support Point II by referring the Court to the arguments made in the cases reviewed under Point I.

CONCLUSION

The trial court erred in denying the defendant's motion to

dismiss the information against him both at the time when the motion was made at the conclusion of the prosecution's case and at the time when the motion was made at the conclusion of the trial. Defendant at most knew that marijuana was growing. No evidence was presented by the prosecution which demonstrated that a sufficient nexus existed between the defendant and the contraband to permit an inference that the defendant knew of its existence and had both the power and the intent to exercise dominion and control over and was responsible for the controlled substance in production. The evidence was wholly insufficient to support a conviction by the jury of the defendant Rick Warenski.

Based upon this Court's decisions in the Schroff, Anderton, and Fox cases, the defendant respectfully requests this Court to reverse his conviction and to order a dismissal of the Information against him.

RESPECTFULLY submitted this 18th day of July, 1988.

Gary H. Weight

GARY H. WEIGHT
Attorney for Appellant

DELIVERY CERTIFICATE

I hereby certify that I delivered four true and correct copies of the foregoing Brief of Appellant to Mr. David Wilkinson, Utah Attorney General, 236 State Capitol, Salt Lake City, UT 84114 this 18th day of July, 1988.

Gary H. Weight

GARY H. WEIGHT

ADDENDUM

STEVEN B. KILLPACK
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SPANISH FORK DEPARTMENT, EIGHTH CIRCUIT COURT,
UTAH COUNTY, FOURTH JUDICIAL DISTRICT, STATE OF UTAH

STATE OF UTAH,
Plaintiff,

vs.

RICHARD MERANDA, TERRI MERANDA, and RICK WARENSKI
Defendant(s).
DOB: 12-27-57
DOB: 6-15-61
DOB: 8-4-54

INFORMATION

Criminal No.

STEVEN B. KILLPACK, Utah County Attorney, State of Utah, accuses the defendant(s) of the following crime(s):

CULTIVATION OF MARIJUANA, a felony of the third degree, in violation of Section 58-37-8(1)(a), Utah Code Annotated, 1953 as amended, in that they, on or about 8 September 1987, in Utah County, STate of Utah, did knowingly and intentionally produce a controlled substance, to-wit: Marijuana.

This Information is based on evidence sworn to by: Alex Hunt, UCSO

Alex Hunt
COMPLAINANT

Authorized for prosecution by:

Steven B. Killpack
UTAH COUNTY ATTORNEY

Subscribed and sworn to before me this 9 day of 9 19 87

C R Mads
DEPUTY

JUDGE

Estimated time for preliminary hearing:

theory is applicable in this context only to suits for infringement of patent that presupposes ownership.[14] Defendant has no ownership rights in the patent and a suit to establish those rights would be governed by the three-year statute of limitations, which began to run at the time the patent was issued.

Since defendant's action is barred by the statute of limitations, we have no need to reach the merits of the question as to whether plaintiff is a bona fide purchaser for value.

The judgment of the trial court is affirmed. Costs to plaintiff.

OAKS and DURHAM, JJ., and J. DUFFY PALMER, District Judge, concur.

STEWART, J., concurs in the result.

HOWE, J., having disqualified himself, does not participate herein; J. DUFFY PALMER, District Judge, sat.

STATE of Utah, Plaintiff and Respondent,

v.

Carl L. and Lana G. ANDERTON, Defendants and Appellants.

No. 18506.

Supreme Court of Utah.

Aug. 15, 1983.

Defendants were convicted in the Fourth District Court, Duchesne County, David Sam, J., of possession of marijuana with intent to distribute for value and production of marijuana, and they appealed. The Supreme Court, in opinions by Hall, C.J., and Durham, J., held that: (1) affidavit in support of warrant for search of house was not insufficient even though it did not set forth time and place of informant's observations or by whom marijuana was possessed where affidavit set forth sufficient underlying circumstances to support conclusions reached by affiant and to support reliability and credibility of informant, and (2) evidence was insufficient to support conviction of defendant's wife where conviction was based solely on her joint ownership of and residence in home where drugs were found.

Defendant's conviction affirmed; defendant's wife's conviction reversed.

Durham, J., filed opinion concurring separately in result in which Stewart and Howe, JJ., concurred.

1. Drugs and Narcotics ⇐188

Affidavit in support of warrant for search of defendant's house for marijuana was not insufficient even though it failed to set forth time and place of informant's observation or by whom marijuana was possessed where sufficient underlying circumstances were set forth to support conclusions reached by affiant and to support reliability and credibility of informant in that affidavit recited that informant personally observed the marijuana and was couched in present-tense language describing ongoing criminal activity.

2. Searches and Seizures ⇐3.4

Blank portions of affidavit in support of search warrant would be disregarded despite defendants' contention that blank portions rendered affidavit void in light of statute providing that every paper made or issued by a justice must be issued without a blank to be filled in by another where there was no contention on the part of defendants that blanks complained of in any way infringed upon their substantial rights. Rules Crim.Proc., Rule 30; U.C.A.1953, 77-23-9, 78-5-24; U.S.C.A. Const.Amend. 4.

14. *M. & T. Chemicals, Inc. v. International Business Machines Corp.*, 403 F.Supp. 1145 (S.D.N.Y.1975), *aff'd*, 542 F.2d 1165 (2nd Cir. 1976).

3. Searches and Seizures ⇐3.8(1)

Magistrate's failure to comply with statute requiring return of search warrant and related documents to appropriate court within 15 days after return on execution of the warrant constituted nothing more than failure to perform ministerial act which did not affect validity of search warrant or search conducted thereunder in absence of any showing that failure to comply with statute had any adverse affect upon defendants' substantial rights. U.C.A.1953, 77–23–9.

4. Criminal Law ⇐1159.2(7)

Accepted standard of appellate review permits Supreme Court to overturn conviction only when it is made to appear that reasonable minds must necessarily entertain reasonable doubt of guilt, and Supreme Court should only interfere when evidence is so lacking and insubstantial that reasonable men could not possibly have determined guilt beyond reasonable doubt.

5. Drugs and Narcotics ⇐118

Evidence was insufficient to support conviction of defendant for possession of marijuana with intent to distribute for value and production of marijuana where conviction was based solely on her joint ownership of and residence in home where marijuana was found. U.C.A.1953, 58–37–8.

Robert M. McRae, Vernal, for defendants and appellants.

David L. Wilkinson, Salt Lake City, for plaintiff and respondent.

HALL, Chief Justice:

Defendants were convicted of the offenses of possession of marijuana with intent to distribute for value and production of marijuana.[1] On appeal, they challenge the propriety of the search of their residence, and defendant Lana G. Anderton challenges the sufficiency of the evidence to support her conviction.

The case was tried to the court, sitting without a jury, on partially stipulated facts abstracted as follows: Defendants owned and resided in the residence searched by officers of the Roosevelt Police Department pursuant to a search warrant. The search produced the following:

a. Three (3) planters with four (4) green plants growing in them.

b. One (1) brown paper bag containing two (2) plastic bags each, [sic] of which contained green plant material. One (1) plastic bag containing 7.8 ounces of material and one (1) containing 4.1 ounces of material [sic].

c. One (1) brown paper bag which contained a large plastic bag which in turn contained eight (8) smaller plastic bags of green plant material. Each of the smaller bags contained approximately one (1) ounce of material. The large plastic bag also contained one (1), [sic] foil-wrapped, [sic] chunk of "hash" which weighted [sic] 10.2 grams.

d. One (1) plastic bag of green plant material.

e. One (1) film canister of green plant material.

f. Two (2) packages of cigarette rolling papers.

It was further stipulated that the plants and the green plant material were in fact marijuana, and in reference to the bags of marijuana defendant Carl L. Anderton stated, "My wife doesn't know anything about this. I just came home with everything."

The evidence at trial was that the subject search warrant was issued by a justice of the peace, John B. Gale, upon the affidavit of Officer Jeff Stagg of the Roosevelt Police Department that a confidential informant had related to him that he had "personally observed the substance in question." It was also recited in the affidavit that Officer Stagg had conferred extensively with the informant who had previously cooperated with him, "providing truthful, cogent information, resultant in bodily injury to C.I." Portions of the preprinted form affidavit allowing for insertion of the date of the informant's observation and the date

1. In violation of U.C.A., 1953, § 58–37–8.

the information was given to the affiant were left blank.

The affidavit further recited that the marijuana was located at defendants' residence, which was identified by street address, and in a pickup truck identified by make, model, color and license number. For the stated purpose of a nighttime search, the affiant recited that he was positive of the location of the marijuana because "I have conferred extensively with an informant of a confidential nature, who has related to me the information contained herein."

The search warrant was issued at 9:42 p.m. on May 3, 1981, and the search was conducted that same night. The search warrant, the supporting affidavit and the officer's return of the property seized was retained by Judge Gale until August 27, 1981, when they were turned over to Officer Wayne Embleton for use at the preliminary hearing conducted by the circuit court. Thereafter, Officer Embleton kept the documents in his possession until the trial, at which time he testified that they had not been altered.

Defendants first contend that the evidence should have been suppressed because the affidavit in support of the warrant failed to state probable cause for the search in that it did not meet the two-pronged test advanced in *Aguilar v. Texas*,[2] followed in *Spinelli v. United States*,[3] which requires 1) that "underlying circumstances" be set forth sufficient for the magistrate to independently judge the validity of the informant's conclusion, and 2) that the affiant support his claim that the informant was "credible" and his information was "reliable."

[1] Defendants urge that the affidavit does not meet the *Aguilar* test because it does not set forth the time and place, nor by whom the marijuana was possessed. Furthermore, since authority was sought to search a vehicle in addition to the residence, the location of the marijuana was unknown to affiant.

As was observed in *Spinelli* regarding the notion of probable cause:

> [P]robability, and not a prima facie showing, of criminal activity is the standard of probable cause[4] . . . [I]n judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense,[5] and that their determination of probable cause should be paid great deference by reviewing courts.[6]

393 U.S. 410, 419, 89 S.Ct. 584, 590, 21 L.Ed.2d 637.

Applying the foregoing standards in the instant case, the affidavit contains adequate facts to support the magistrate's finding of probable cause to issue the warrant. Read as a whole, and in a commonsense way,[7] the affidavit sets forth sufficient underlying circumstances to support the conclusions reached by the affiant and to support the reliability and credibility of the informant.

Unlike *Aguilar*, the affidavit in this case recites that the informant personally observed the marijuana. Also, the affiant's conclusion that a search of the residence and vehicle would produce the contraband was supported by the further recitals that the informant "has related to me the information contained herein," verified by the affiant's own investigation that "the individual named herein sells contraband in quantity."

It is also to be observed that during the pendency of this appeal, in the case of *Illi-*

2. 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

3. 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

4. Citing *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964).

5. Citing *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965).

6. Citing *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960); *see also State v. Romero*, Utah, 660 P.2d 715 (1983).

7. *United States v. Ventresca*, *supra* n. 5.

nois v. Gates,[8] the United States Supreme Court abandoned the rigid "two-pronged test" advanced in *Aguilar* and *Spinelli* in favor of reaffirming the totality-of-the-circumstances analysis that traditionally has informed probable cause determinations. In so doing, the Court had this to say:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for ... conclud[ing]" that probable cause existed. *Jones v. United States*, supra, 362 U.S., at 271 [80 S.Ct. at 736]. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli*.

—— U.S. —— at ————, 103 S.Ct. 2317, at 2332, 76 L.Ed.2d 527.

The "totality of the circumstances test" as reaffirmed in *Gates* lends even further support for the conclusion reached by the magistrate in the instant case that probable cause existed for the issuance of the search warrant.

Defendants also rely upon *Rosencranz v United States*,[9] which interpreted *United States v. Ventresca*[10] as requiring the affidavit to specifically set forth the time of the informant's observations. We do not so interpret *Ventresca*.

The standard established in *Ventresca* is that of commonsense, which was stated therein as follows:

> [A]ffidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion.

380 U.S. at 108, 85 S.Ct. at 745.

> [T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded warrants.[11]

The affidavit in the instant case, couched as it is in present-tense language which describes on-going criminal activity, clearly refutes any contention that it was based upon stale information.[12] Further applying the commonsense rule espoused in *Ventresca*, the affidavit on its face presented a substantial basis for the magistrate to conclude: 1) that the information received by the affiant was recent and contemporaneous; 2) that contraband was probably possessed by defendant Carl Anderton; and 3) that realistically the search should include not only the residence, but the vehicle as well.

[2] Defendants next contend that the blank portions of the affidavit rendered it void in light of U.C.A., 1953, § 78-5-24, which provides:

> Every paper made or issued by a justice, except a subpoena, must be issued without a blank to be filled in by another; otherwise it is void.

There is some considerable question whether the foregoing statute applies to the affidavit in question since it would appear that it is not "a paper made or issued by a justice" containing blanks "to be filled in by another." However, we do not address that issue, for in the absence of any contention

8. —— U.S. ——, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)

9. 356 F.2d 310 (1st Cir. 1966).

10. *Supra* n. 5

11. Citing *Jones v. United States*, 362 U.S. at 270, 80 S.Ct. at 735. In accord *State v. Romero*, *supra* n. 6

12. In accord *State v. Clay*, 7 Wash.App. 631, 501 P.2d 603 (1972), *Guzewicz v. Slayton*, 366 F.Supp. 1402 (E.D.Va. 1973), *Covington v. State*, 129 Ga.App. 150, 199 S.E.2d 348 (1973), *State v. Boudreaux*, La., 304 So.2d 343 (1974)

on the part of defendants that the blanks complained of in any way infringed upon their substantial rights, the Court is obliged to disregard the "defect" in the affidavit by reason of the content of Rule 30, Utah Rules of Criminal Procedure, which provides as follows:

> (a) Any error, defect, irregularity or variance which does not affect the substantial rights of a party *shall be disregarded.* [Emphasis added.]

[3] Defendants also contend that the magistrate's failure to return the search warrant and the related documents to the appropriate court within fifteen days after the return on execution of the warrant in compliance with U.C.A., 1953, § 77-23-9 rendered the documents void. Again, however, defendants have made no showing that the magistrate's failure to comply with the statute had any adverse effect upon their substantial rights, nor have they shown that such failure in any way compromised the integrity of the documents. We therefore conclude that the violation of the statute constituted nothing more than the failure to perform a ministerial act which did not affect the validity of the search warrant and the search conducted thereunder.[13]

The remaining contention on appeal is that of defendant Lana Anderton that the evidence was insufficient to convict her of the crimes charged. The State's rejoinder is that not only was the evidence at trial sufficient to convict, but there was an absence of substantial or believable evidence necessary to generate reasonable doubt of guilt.

[4] The accepted standard of appellate review permits this Court to overturn a conviction only when it is made to appear that reasonable minds must necessarily entertain a reasonable doubt of guilt,[14] and we should only interfere when the evidence is so lacking and insubstantial that reasonable men could not possibly have determined guilt beyond a reasonable doubt.[15]

Viewing the evidence in the light most favorable to the judgment of the trial court as we are obliged to do,[16] this writer concludes that it adequately supports the conviction of both defendants. The quantity of marijuana and hashish, which included live marijuana plants, was too large for personal consumption, and it was found in the defendants' home, which they owned and resided in as husband and wife.

It was reasonable for the trial court to infer from the attendant facts and circumstances that the contraband, particularly the potted plants of marijuana, was in plain view. It was also reasonable to infer from the stipulation of the parties that both defendants were present during the search, at which time defendant Carl L. Anderton volunteered that "my wife doesn't know anything about this. I just came home with everything." Furthermore, in their brief on appeal, defendants concede that they were both present during the search.[17]

The fact that defendant Lana Anderton was not named in the search warrant is of no moment, because the resultant search and the stipulation of facts placed her in constructive, if not actual, possession of a large quantity of contraband which was obviously intended for distribution.

13. *State v. Romero, supra* n. 6; *see also Wright v. State*, Okl.Cr., 552 P.2d 1157 (1976); *People v. Wilson*, 173 Colo. 536, 482 P.2d 355 (1971); *United States v. Wilson*, 451 F.2d 209 (5th Cir.1971).

14. *State v. Fort*, Utah, 572 P.2d 1387 (1977).

15. *State v. Lamm*, Utah, 606 P.2d 229 (1980).

16. *State v. Kerekes*, Utah, 622 P.2d 1161 (1980).

17. Nevertheless, a majority of the Court concludes to the contrary and opines that the evidence of constructive possession was insufficient to support the conviction of defendant Lana G. Anderton. However, viewing the evidence in the light most favorable to the judgment of the trial court, it supports the conclusion that the contraband was found in the presence of both defendants, in open view and readily accessible to each, all of which meets the standards of constructive possession laid down in the case of *United States v. Davis*, 562 F.2d 681 (D.C.Cir.1977), and others relied upon by the majority.

The only exculpatory evidence presented to the trial court was defendant Carl Anderton's assertion that "my wife doesn't know anything about this. I just came home with everything." The trial court apparently discounted the statement as being only an act of chivalry made in an effort to exonerate his wife.

[5] It lies within the prerogative of the trial court to weigh the evidence and determine the credibility of the witnesses, and this Court should not substitute its judgment for that of the trial court on issues of fact that are supported by substantial, credible and admissible evidence.[18] Nevertheless, a majority of the Court has concluded that the evidence was insufficient to sustain the conviction of the defendant Lana G. Anderton, and her conviction is therefore reversed.

The conviction and judgment of the trial court as to the defendant Carl L. Anderton are affirmed in all respects.

OAKS, J., concurs.

DURHAM, Justice (concurring separately in result):

[4, 5] I concur with the opinion of the Chief Justice in affirming Carl Anderton's conviction of the crimes of production of marijuana and possession of marijuana with intent to distribute for value. *See,* U.C.A., 1953, §§ 58–37–8(a)(i) & (ii) (Supp.1981). However, I believe that there is insufficient evidence to convict his wife Lana Anderton. The standard of review, as cited by the Chief Justice's opinion, authorizes this Court to overturn a conviction when the evidence is so lacking or inconclusive that reasonable minds must entertain a doubt of guilt. The evidence in this case is so inadequate as to compel such reasonable doubt of guilt in the case of Mrs. Anderton.

The issue here is whether the facts in the record are sufficient to establish Mrs. Anderton's guilt for offenses which require both knowledge and intent. *See,* U.C.A., 1953, § 58–37–8(a) (Supp.1981). Of the two elements of possession with intent to distribute, possession must first be shown. While this Court has stated that "[u]nlawful possession does not necessarily mean that the substance be found on the person of the accused or that he have sole and exclusive possession thereof," to prove constructive possession, the evidence must show that the drugs were "subject to [the accused's] dominion and control." *State v. Carlson,* Utah, 635 P.2d 72, 74 (1981) (footnotes omitted).[1] Lana Anderton's conviction on this charge was based solely on her joint ownership of and residence in the home where the drugs were found. There is substantial support for the rule that where a defendant is in nonexclusive possession or occupancy of the premises on which controlled substances are found, there must be some additional incriminating evidence to establish guilt of possession:

> [P]roof of a proprietary interest in or regular occupancy of the premises *alone* is not sufficient to prove constructive possession.

United States v. Davis, 562 F.2d 681, 693 (D.C.Cir.1977). (emphasis in original). The Supreme Court of Virginia has stated that:

> There is no presumption of knowing or intentional possession of the marijuana from [defendant's] occupancy of the residence. Her occupancy of the premises as a cotenant, however, is a factor to be considered with other evidence in determining whether she had constructive possession.

Eckhart v. Commonwealth, 222 Va. 447, 281 S.E.2d 853, 855 (1981) (citations omitted). *See also United States v. Lawson,* 682 F.2d 1012, 1016–18 (D.C.Cir.1982), *Evans v. United States,* 257 F.2d 121 (9th Cir.1958). One

18. *State v. Lamm, supra* n. 15.

1. This case involved a husband and wife who, following a warrant search of their home, were charged with possession of a controlled substance with intent to distribute. Police officers searched the bedroom and found guns, drugs and paraphernalia, including sealing agent, plastic bags, measuring spoons, a funnel, a strainer and scales. The charges against the wife were dismissed.

summary of the general rule reads as follows:

> [W]here the defendant is in nonexclusive possession of premises on which illicit drugs are found, it cannot be inferred that he knew of the presence of such drugs and had control of them, unless there are other incriminating statements or circumstances tending to buttress such an inference.

Annot., 56 A.L.R.3d 948, 957 (1974 & Supp. 1982).

In light of the requirement of other incriminating circumstances in addition to mere occupancy, the facts of each case are critical and must be presented in detail. Some of the key factual determinations which have supported findings of constructive possession in other cases are: 1) the defendant's presence at the time the drugs were found, with emphasis on the fact that the drugs were in plain or open view, *see United States v. Lawson, supra; United States v. Davis, supra; Ford v. State,* 37 Md.App. 373, 377 A.2d 577 (1977); *Eckhart v. Commonwealth, supra;* 2) the defendant's access to the drugs, *see United States v. Davis, supra; State v. Brown,* 80 N.J. 587, 404 A.2d 1111, 1115 (1979); 3) the proximity of defendant to the drugs, *see Ford v. State, supra,* although "[m]ere proximity to the controlled substance . . . is insufficient to establish possession." *Eckhart v. Commonwealth, supra,* at 450, 281 S.E.2d at 855; *see also Wright v. Commonwealth,* 217 Va. 669, 232 S.E.2d 733 (1977) (where the defendant, although not residing in the apartment, was found sitting in a bedroom next to a friend who was injecting himself with heroin, and substantial quantities of heroin were found three feet from the defendant; the defendant was acquitted despite evidence of history of heroin use); 4) evidence indicating that the "defendant was participating with others in the mutual use and enjoyment of the contraband"; *Ford v. State, supra,* at 382, 377 A.2d at 581–82 (quoting *Folk v. State,* 11 Md.App. 508, 514–18, 275 A.2d 184, 187–89 (1971)); and 5) incriminating statements, *Evans v. United States, supra.*[2]

Thus, it is clear that, in finding constructive possession of controlled substances in nonexclusive occupancy settings, courts have relied on extensive and detailed factual evidence. In contrast, the facts as stipulated in this case[3] consist of a confirmation that the defendants owned and resided in the house where the warrant search was made, a list of the items found in that search, most of which were enclosed in two brown paper bags, and the statement made by defendant Carl Anderton that his wife knew nothing about the drugs and that he had just returned home with them. The only other relevant evidence in the record consists of testimony regarding the amounts of marijuana and hashish generally kept by an individual for personal use.[4] There is no evidence as to where in the home the drugs were found or where the defendant Lana Anderton was when the officers entered the house. Moreover, there is no evidence of any incriminating conduct or statements of Lana Anderton. Thus, there is nothing which establishes that the drugs were in her view, accessible or even close to her, or that she was participating in the use of the drugs or knew of their presence in the house.

Similarly, there is no evidence in the record which shows Lana Anderton's knowing or intentional involvement in the production of marijuana. The only evidence is that of joint residence in the home where the plants were found; there is nothing to

2. Other evidentiary factors which have been recognized by courts in determining guilt of possession in nonexclusive occupancy cases include suspicious behavior, previous sale of drugs and drug use. *See* Annot., *supra.*

3. There was no evidence offered by the State on this issue except for a brief written stipulation of fact.

4. That testimony related to use amounts for an *individual.* Presumably those amounts should have been doubled to determine the amounts for the personal consumption of both defendants.

establish how long the plants had been there or where they were found.

When the facts of this case are considered, particularly in light of the cases cited above, it requires a "leap of faith" to find that Lana Anderton is guilty solely on the basis of her marital relationship with her husband and their joint occupancy of the home. In view of the lack of other evidence, the self-inculpatory statement made by Carl Anderton that he had "just brought the drugs home" compels doubt about his wife's guilt. Lana Anderton's conviction should therefore be reversed.

STEWART and HOWE, JJ., concur in the concurring opinion of DURHAM, J.

HALL, Chief Justice: (Dissenting)

I do not share the reasoning of the Court in overturning *State v Brady* [1]

While the Utah Constitution affords the right of appeal in all cases,[2] that right may be effectively waived or abandoned One who escapes not only abandons his appeal, he also abandons and forsakes the judicial system as a whole He no longer relies upon it in any respect, and to dismiss his appeal for that reason is neither to be viewed as a forfeiture of a constitutional right nor as a penalty This is particularly demonstrated by the facts of the instant case wherein Tuttle did not voluntarily return to custody with any excuse or justification for his behavior, but in fact remained at large for a considerable length of time. Had he not been tracked down, arrested, and involuntarily returned to custody, he no doubt would have remained at large Only because of his reincarceration does he again seek relief from the system

I would not disturb the prior dismissal of the appeal

Howe, Justice, concurs in the dissenting opinion of Chief Justice Hall

1. Utah, 655 P.2d 1132 (1982)
2. Art. I, §12.

Cite as
20 Utah Adv. Rep. 8

IN THE SUPREME COURT OF THE STATE OF UTAH

The STATE of Utah,
Plaintiff and Respondent,
v.
Gary L. FOX,
Defendant and Appellant.

No. 20088

The State of Utah,
Plaintiff and Respondent,
v.
Clive Fox,
Defendant and Appellant.

No. 20089

FILED: October 18, 1985

SECOND DISTRICT
Hon. David E Roth

ATTORNEYS
H Don Sharp for Defendant and Appellant
David L Wilkinson, Earl F Dorius for Plaintiff and Respondent

STEWART, Justice:

Defendants Gary and Clive Fox were convicted of possession with intent to distribute and production of a controlled substance in violation of U C A , 1953, §58 37-8(1)(a)(i) and §57 37 8(1)(a)(ii) On appeal, both defendants argue that the evidence is insufficient to sustain the charges We affirm the conviction of Gary Fox and reverse the conviction of Clive Fox

In June 1983, the Weber County Sheriff's Office received an anonymous letter stating that 7-foot marijuana plants growing at 249 Harris Street in Ogden were soon to be harvested The residence belonged to Gary Fox Acting on the tip, an officer went to the residence to investigate He saw that the yard contained two opaque greenhouses, one of which was attached to the house The officer was able to determine that one greenhouse contained marijuana because a marijuana leaf was pressed against the greenhouse That same day, the officer obtained a search warrant for the house and the greenhouses and conducted a search while the premises were unoccupied

The home had two bedrooms One bedroom contained men's clothing, carpentry tools, and a plastic identification card for Clive which had expired April 15, 1982 The second bedroom contained men's clothing, women's underclothing, a checkbook and bank deposit slips with Gary's name on them, a book entitled *Marijuana Grower's Guide,* marijuana and drug paraphernalia The kitchen contained marijuana and other paraphernalia Both greenhouses contained marijuana plants One of the greenhouses was accessible from the kitchen and had no outside entrance The kitchen and greenhouse were not separated or blocked off from the remainder of the house, and the entire house was very humid In searching the house the officers found mail addressed to both Gary and Clive

Gary owned the property He arranged for the delivery of gas to the house, and the gas bills were sent to him The telephone listing, however, was in Clive's name, and had been since 1979

Neither Gary nor Clive had been seen near the house by the police Mr Seamon, a neighbor, testified that he thought Gary and Clive lived at the house "I would see them on weekends would be all," doing yard work Mrs Seamon testified in response to a question whether she knew who lived at 249 Harris 'Well, I had seen Clive and Gary Fox over there ' Neither witness remembered seeing either Gary or Clive at the house on any specific occasion during the month

preceding the arrest, but remembered they were absent for a period following the arrest. An officer testified that the house appeared to be occupied because the refrigerator and cupboards contained food, and the kitchen had both clean and dirty dishes in it.

At the close of the State's case, both Gary and Clive moved to dismiss the charges because of insufficient evidence. The motion was denied. The trial court stated that the defendants lived in or occupied the home, and that there was "enough marijuana growth for sale."

Both were convicted of production of a controlled substance and possession of a controlled substance with intent to distribute for value in violation of U.C.A., 1953, §58-37-8(1)(a)(i) and §58-37-8(1)(a)(ii). On appeal, the defendants renew their claim that there was insufficient evidence to prove that they grew marijuana and that the marijuana found in the residence belonged to them or was for distribution.

This Court may overturn a conviction for insufficient evidence when it is apparent that the evidence is insufficient to prove each element of the crime beyond a reasonable doubt. *State v. Petree*, Utah, 659 P.2d 443, 444 (1983).

A conviction for possession of a controlled substance with intent to distribute requires proof of two elements: (1) that defendant knowingly and intentionally possessed a controlled substance, and (2) that defendant intended to distribute the controlled substance to another, U.C.A., 1953, §58-37-8(1)(a)(ii). Actual physical possession presupposes knowing and intentional possession. However, actual physical possession is not necessary to convict a defendant of possession of a controlled substance. *State v. Carlson*, Utah, 635 P.2d 72, 74 (1981). A conviction may also be based on constructive possession. *Id.* In *Carlson*, we held that constructive possession exists "where the contraband is subject to [defendant's] dominion and control." *Id.* However, persons who might know of the whereabouts of illicit drugs and who might even have access to them, but who have no intent to obtain and use the drugs can not be convicted of possession of a controlled substance. Knowledge and ability to possess do not equal possession where there is no evidence of intent to make use of that knowledge and ability.

To find that a defendant had constructive possession of a drug or other contraband, it is necessary to prove that there was a sufficient nexus between the accused and the drug to permit an inference that the accused had both the power and the intent to exercise dominion and control over the drug. *See United States v. Cardenas*, 748 F.2d 1015, 1019-20 (5th Cir. 1984); *United States v. Rackley*, 742 F.2d 1266, 1272 (11th Cir. 1984); *United States v. Davis*, 562 F.2d 681, 694 (1977) (Bazelon, C.J., dissenting in part concurring in part).

Whether a sufficient nexus between the accused and the drug exists depends upon the facts and circumstances of each case. *State v. Anderton*, Utah, 668 P.2d 1258, 1264 (1983). Ownership and/or occupancy of the premises upon which the drugs are found, although important factors, are not alone sufficient to establish constructive possession, especially when occupancy is not exclusive. *United States v. Davis*, 562 F.2d 681, 693 (D.C. Cir. 1977). Some other factors which might combine to show a sufficient nexus between the accused and the drug are: incriminating statements made by the accused, *Allen v. State*, 158 Ga. App. 691, 282 S.E.2d 126, 127 (1981) (defendant told unnamed individual that defendant had $500 worth of marijuana); incriminating behavior of the accused, *United States v. Garcia*, 655 F.2d 59 (5th Cir. 1981) (defendant nodded affirmatively when introduced as owner of cocaine, and remained with drug during negotiations); *Francis v. State*, Ala. App., 410 So.2d 469 (1982) (defendant slammed door in face of police and ran back into the house yelling, "throw it in the fire"); presence of drugs in a specific area over which the accused had control, such as a closet or drawer containing the accused's clothing or other personal effects, *Walker v. United States*, 489 F.2d 714, 715 (8th Cir.) (drugs found in closet containing defendant's clothing), *cert. denied*, 416 U.S. 990 (1974); presence of drug paraphernalia among the accused's personal effects or in a place over which the accused has special control, *United States v. James*, 494 F.2d 1007, 1030-31 D.C. Cir.) (drug paraphernalia found in a locked box in defendant's dresser), *cert. denied sub nom., Jackson v. United States*, 419 U.S. 1020 (1974); *Petley v. United States*, 427 F.2d 1101, 1106 (9th Cir.) (pipe containing marijuana residue found in defendant's duffel bag), *cert. denied*, 400 U.S. 827 (1970). In every case, the determination that someone has constructive possession of drugs is a factual determination which turns on the particular circumstances of the case. Among these circumstances must be facts which permit the inference that the accused intended to use the drugs as his or her own. A conviction for production of a controlled substance requires evidence that the accused knowingly and intentionally produced the controlled substance. U.C.A., 1953, §58-37-8(1)(a)(i) (supp. 1983); *see State v. Echevarrieta*, Utah, 621 P.2d 709, 712 (1980); and evidence of possession may be part of a circumstantial link in the necessary chain of evidence.

The evidence as to Gary sufficiently

supports his convictions for production of a controlled substance and possession of marijuana with an intent to distribute. Gary owned the property where the marijuana was found. Although he may not have had exclusive control or possession (in a practical non-legal sense) of the premises, his non-exclusive possession and control combined with other incriminating evidence to provide an adequate foundation for the convictions. *State v. Anderton*, Utah, 668 P.2d 1258, 1264 (1983). Gary owned the house. His occupancy and control was evidenced by the presence of his personal effects in the same room as marijuana, drug-related paraphernalia, and a book entitled *Marijuana Grower's Guide*. Another room also contained marijuana and drug paraphernalia. Because he was the owner and occupier of the property and because of the manner in which the greenhouses were constructed in proximity to the house, one being accessible only through the house, there is a reasonable inference that he not only knew of the greenhouses and their contents but also had the power and intent to exercise dominion and control over the marijuana located in them, and was responsible for growing the marijuana. Furthermore, there was sufficient evidence that he intended to distribute the marijuana. Where one possesses a controlled substance in a quantity too large for personal consumption, the trier of fact can infer that the possessor had an intent to distribute. *State v. Anderton*, Utah, 668 P.2d 1258, 1262 (1983). The police found approximately 2,850 mature marijuana plants growing on Gary's property, an amount of marijuana unquestionably too large for personal use.

On these facts the evidence was sufficient to sustain the conviction of Gary Fox of possession of a controlled substance with intent to distribute, and production of a controlled substance.

Because one of the greenhouses was attached to the house and was openly accessible from the kitchen, the trier of fact could reasonably find that Clive Fox knew that marijuana was being grown in the house. However, to prove that he had constructive possession of the marijuana, the evidence must also show that he had the power and intent to exercise dominion or control over the marijuana. There is no evidence that Clive Fox had any intent to grow or to possess the marijuana in the greenhouses. While he may have had knowledge of the existence of marijuana on the premises, that is not the equivalent of constructive possession. Indeed, evidence supporting the theory of "constructive possession" must raise a reasonable inference that the defendant was engaged in a criminal enterprise and not simply a bystander. That is, the evidence in its totality must show that defendant's dominion or control over the area must have been such that he in fact intended to exercise dominion and control over the marijuana.

The evidence showed that the telephone at 246 Harris Street was in Clive's name, that he was seen there on an undated occasion doing yard work, that mail addressed to him was found at unspecified locations within the house, and that his expired identification card was found in the room that apparently was his sleeping quarters, which contained no marijuana or related paraphernalia. On the totality of the evidence, a reasonable person could not find beyond a reasonable doubt that Clive had even non-exclusive dominion or control over the area where the marijuana was found. There was not any evidence at all beyond the possibility that Clive sometimes occupied the premises to link Clive Fox to the marijuana. In addition, there is no evidence that Clive grew the marijuana plants or participated in producing or distributing the marijuana.

The conviction of Gary Fox is affirmed. The conviction of Clive Fox is reversed, and that case is remanded for the purpose of discharging him.

WE CONCUR:
Christine M. Durham, Justice
Michael D. Zimmerman, Justice

HALL, Chief Justice: (Concurring and Dissenting)

I do not join the Court in overturning the convictions of defendant Clive Fox because I am not persuaded that the evidence is insufficient to prove guilt beyond a reasonable doubt.

This Court's standard of review when faced with a claim of insufficiency of the evidence is to view the evidence, and the facts reasonably to be inferred therefrom, in the light most favorable to the determination made by the trier of fact.[1] We will only interfere when the evidence is so lacking and insubstantial that a reasonable person could not possibly have determined guilt beyond a reasonable doubt.[2]

The evidence was that defendant's identification card and mail addressed to him were found in the residence. Phone service was in his name. The neighbors testified that defendant had lived there with defendant Gary Fox over a period of three years and that they had constructed the greenhouse which was only accessible through a door off the kitchen. No one else but defendant was identified as living in the house. Items of men's clothing were in the bedrooms, dirty dishes were in the sink, beds were unmade, and food was stocked in cupboards and in

the refrigerator, all of which indicated the house was used as a dwelling.

The entire house was a virtual marijuana production center. The attached greenhouse was filled with growing marijuana plants which made the premises uncomfortably humid. The doorway from the kitchen afforded an unobstructed view of the greenhouse and its contents. A large bag of harvested marijuana was found in the kitchen, a common area of the house likely to be used daily by the occupants.

It was certainly reasonable to infer that not just one but *both* defendants knew of the greenhouse and its contents, had the power and intent to exercise dominion and control over the marijuana, and were jointly engaged in growing the marijuana and holding it for sale.

I would affirm the convictions of both defendants.

Howe, Justice, concurs in the concurring and dissenting opinion of Chief Justice Hall.

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1. State v. McCardell, Utah, 652 P.2d 942, 945 (1982).

2. *Id.*

Cite as
20 Utah Adv. Rep. 11

IN THE SUPREME COURT OF THE STATE OF UTAH

MODIFIED OPINION

Ronald D. JONES and Pamela Jones,
Plaintiffs and Respondents,
v.
AMERICAN COIN PORTFOLIOS, INC., a California corporation; Robert G. Holt, as Trustee, L. H. Investment Company, a Utah partnership, and L. H. Investment Group, a Utah corp.,
Defendants and Appellant.

American Coin Portfolios, Inc., a California corporation, and Oakwood Manor Co., a California partnership,
Counterclaim and Cross-claim Plaintiffs and Appellants,
v.
Ronald D. Jones, Pamela Jones, Carl E. Barnes, Mary Barnes, L. H. Investment Company, a Utah partnership, L. H. Investment Group, a Utah corporation, G. Lee Eastman, Donald J. Boshard and A. Richard Calder,
Counterclaim and Cross-claim Defendants and Respondents.

No. 19003
FILED: October 21, 1985

THIRD DISTRICT
Hon. David B. Dee

ATTORNEYS:

Stanley K. Stall, David G. Williams for Plaintiffs and Respondents.

Kent T. Anderson for Defendants and Appellants.

DURHAM, Justice:

This is an appeal from an entry of partial summary judgment in favor of the respondents, Ronald D. Jones and Pamela Jones ("Jones"). Jones brought a quiet title action on a parcel of real property, and the appellants, American Coin Portfolios, Inc. and Oakwood Manor Co. (hereinafter jointly referred to as "American Coin"), counterclaimed to foreclose an alleged lien on the same property. American Coin made a motion for summary judgment against Jones, which the trial court denied. In the order denying American Coin's motion for summary judgment, the trial court found that American Coin had no security interest in the property.

As a result of that finding American Coin stipulated to an entry of a partial summary judgment in favor of Jones. Although there are multiple parties in this case, that partial summary judgment finally adjudicated the respective rights of Jones and American Coin. Therefore, the district court directed the entry of final judgment, finding that there was no just reason for delay pursuant to Rule 54(b), Utah R. Civ. P.

American Coin now seeks to have this Court reverse the partial summary judgment and direct the trial court to enter judgment in its favor or, alternatively, to vacate the partial summary judgment and remand the case for further proceedings. We reverse and direct the trial court to enter judgment in favor of American Coin.

The transactions that created the security interest in question were between American Coin and another defendant to the quiet title action, L. H. Investment Co., which is not a party to this appeal. After a series of transactions between L. H. Investment and American Coin wherein the property had been used as collateral, the property was conveyed by L. H. Investment to Jones. A description of the transactions between

30 Utah 2d 125

STATE of Utah, Plaintiff and Respondent,

v.

John Lee SCHROFF, Defendant and Appellant.

No. 13308.

Supreme Court of Utah.

Oct. 3, 1973.

Defendant was convicted in the Fifth District Court, Washington County, J. Harlan Burns, J., of violating statute proscribing the cultivation and production of marijuana, a controlled substance, and he appealed. The Supreme Court, Tuckett, J., held that evidence that defendant was observed crossing corn fields near areas where marijuana was growing and was later observed picking leaves from one of the plants and placing them in a plastic bread wrapper sack, while sufficient to support a charge that defendant was in possession of marijuana, was insufficient to support conviction of cultivating and producing marijuana.

Reversed; information dismissed.

Henriod, J., concurred and filed opinion.

Ellett, J., dissented and filed opinion, in which Crockett, J., concurred.

Drugs and Narcotics ⇐109

Evidence that defendant was observed crossing corn fields near areas where marijuana was growing and was later observed picking leaves from one of plants and placing them in a plastic bread wrapper sack, while sufficient to support a charge that defendant was in possession of marijuana, was insufficient to support conviction of cultivating and producing marijuana. U.C.A.1953, 58-37-8(1)(a)(i).

Michael W. Park, Cedar City, for defendant and appellant.

Vernon B. Romney, Atty. Gen., David L. Wilkinson, William T. Evans, Asst. Attys. Gen., Salt Lake City, for plaintiff and respondent.

TUCKETT, Justice:

The defendant was charged in the court below with the violation of Section 58-37-8(1)(a)(i). U.C.A.1953, as amended. The charging part of the information alleges that on or about the 8th day of August, 1972, at Santa Clara, Washington County, Utah, the defendant did cultivate and produce marijuana, a controlled substance. The defendant entered a plea of not guilty, and subsequently a trial was had and the jury returned a verdict of guilty of the offense charged in the information.

On August 5, 1972, one LaVar Brachen discovered that in one of his fields someone was cultivating two small patches of plants which he suspected were marijuana. The sheriff of Washington County was notified and on the same day the sheriff and Brachen made an examination of the areas. The plants were growing on high ground and were not watered by irrigation of the other farming areas. Depressions had been made adjacent to the plants and the ground surrounding the plants was moist. Buckets and jugs were found near a creek which was a short distance from the areas above mentioned. Footprints led from the areas to the creek. Thereafter the sheriff and his men placed the areas under surveillance. On or about the 7th day of August, the defendant was observed crossing one of the fields near the areas where the marijuana was growing. On August 8th, the defendant was observed picking leaves from one of the plants and placing it in a plastic bread wrapper sack. The sheriff placed the defendant under arrest and charged him with the offense we are here concerned with. The sheriff testified that after the defendant was in custody he made a statement in substantially the following language: "Why didn't we go catch some of these junkies that were peddling dope and leave us with our marijuana alone?"

It is the defendant's contention here that the evidence is insufficient to support the

charge against him that he did cultivate and produce marijuana. With this contention we must agree. The evidence taken as whole would only support a charge that the defendant was in possession of marijuana. Possession alone is insufficient to show that the defendant cultivated or produced the substance. We conclude that the defendant's conviction must be reversed and it is ordered that the information be dismissed.

CALLISTER, C. J., concurs.

HENRIOD, Justice (concurring):

I concur, believing the State did not prove its charge beyond a reasonable doubt, that defendant did "cultivate *and* produce" marijuana. "Cultivate" seems to be surplusage and not in the statute.[1] One cannot tell whether the jury thought defendant "cultivated" or "produced" or "cultivated *and* produced." Assuming it thought defendant "produced" the plant, there is no evidence that he did. Assuming it thought he simply "cultivated" the plant, there is no such offense. Assuming it thought he both "cultivated and produced" the plant, he is not guilty for several reasons: 1) The information is in the conjunctive, and not severable, and defendant should not be convicted of something not in the statute; 2) there is no evidence defendant "produced" the marijuana, and none about his "cultivating" it,—albeit had there been he would not have been guilty of a statutory offense; 3) the facts recited in the dissent do not show culpability, except if we take gratuitous facts added but not found in the record nor in the opinion, when it says, after remarking that *somebody* was certainly cultivating the plants (see footnote), that "They were his plants" and that "he was giving them his attention."

It is submitted that there are numerous hypotheses indulgable in this case just as consistent with innocence as guilt. An instruction as to this principle should have and perhaps was in substance given, which, if not adhered to by the jury would have resulted in reversible error on conviction. However, in this case, the jury did not have, by way of inference, any alternative but to conclude that the whole backbone of this case was broken perforce by legal undernourishment.

To the contention made in the dissent that the "concurring opinion seems to be unduly technical" because 1) it raises matters not claimed as error on this appeal and *never questioned in the trial court*" and 2) that anyway "cultivate" and "produce" are synonymous terms:

As to 1): The record reveals the following:

> MR. PARK: At this time the state has rested, the defendant moves the court to dismiss this cause as to cultivation and production for the cause and reason that there hasn't been shown any cultivation or production . . . .
>
> THE COURT: . . . it is true the state of Utah[2] does not use the word cultivation. The court hasn't instructed the jury on the proposed instructions *or prepared* any instructions with respect to cultivation . . . . The court is going to take the motion under advisement . . . .

And again, counsel for defendant, at the time the parties had rested and were given their opportunities to make exceptions, *made the following exception*:

> MR. PARK: The defendant hereby objects to Instruction No. 13[3] for the cause and reason that the instruction is

1. 58-37-8(1)(a)(i), U.C.A.1953, as amended, which says it is unlawful to "Produce, manufacture or dispense . . ."

2. It seems obvious that the trial judge was referring to the statute which does not say "cultivation" is part of the offense.

3. "You are instructed that . . . it is unlawful and a felony for any person knowingly to *produce* a controlled substance, in this case marijuana." (Significantly, the word "cultivate" is left out of the instruction but appears in the information's charge of the offense.)

inconsistent with the information as it states that the defendant must only knowingly and intentionally *produce* a controlled substance; said instruction should state that the defendant should knowingly and intentionally *cultivate and produce* a controlled substance.

I recognize that the defendant did not claim error on appeal as a specific "Point on Appeal," but this case being a criminal case of felony magnitude, involving a possible prison sentence and record, I think defendant's statement in his brief that "The transcript is devoid of any evidence connecting the defendant with tilling of the soil, planting, watering or fertilizing any marijuana plants," should be considered as at least an unorthodox but nonetheless intended effort to apprise this court of a matter prejudicial in one degree or another to his interest, based on the differential between improper accusation and any attempt to correct it by a so-called curative instruction.

As to 2) above, a rather strange development appears to have taken place with respect to the meaning of the word "cultivate." Mr. Justice Ellett is quite right that Webster's International Dictionary, Second Edition, published in 1945, has as one of its definitions of "cultivate" the words "to produce by culture." [4] Since that time Mr. Webster has had a change of heart and in his Third Edition, published in 1959, the definition quoted by Mr. Justice Ellett does not appear. This author ventures the suggestion that the phrase was deleted because it was quite irreconcilable with the other supposedly synonymous definitions of "cultivate" as to have caught the lexicographer's eye. For instance, one of the word's definitions in both editions is "to loosen or break up the soil about (growing crops or plants) for the purpose of killing weeds." Marijuana generally has been tagged as a "weed," so that by the latter definition the charge in the information would have to have been that defendant was "*Killing* Weeds and *Producing* Plants" which has no semblance of synonymity as suggested by Mr. Justice Ellett. At any rate, Webster saw fit to correct an abortion of the word, and all we of the majority seek to do is to correct a miscarriage of the charge, and the interment of a highly confusing accusatory procedure, whose memory otherwise might live for quite a spell behind bars after a conviction born of error by the state.

For the dissent to say that any error committed here was harmless in view of the instruction given,—which actually compounded the initial error,—seems to be a conclusion found only in the eyes of the beholder, and not in the statute, nor in the charge found in the eager information, nor in the inadequacy of the instruction, nor in the minds of the veniremen, whose verdict was "we find the defendant GUILTY of the felony of 'Producing *and Cultivating* Marijuana' *as charged* in the Information on file herein," nor in the main opinion, nor, frankly, this author believes, in any sufficiency of evidence if presented to a jury under proper charge and proper instructions.

ELLETT, Justice (dissenting):

I dissent. I could have based my dissent on the facts as stated in the main opinion, but I do not do so, for there is more to be said about the matter.

The defendant neither testified nor produced any evidence at trial, and, therefore, the evidence on behalf of the State is uncontradicted. That evidence showed that a trail led up a steep, sandy bank from a creek to some willow brush on top. Some of the brush had been cut away so that the sun could shine on seven or eight marijuana plants. The land was owned by a stranger to the defendant, and the owner had given no one authority to grow marijuana or any other plants on his land. There were several five-gallon cans beside the creek apparently used to carry water up the trail to the plants. Each plant was growing in an artificially-made depression

4. Arguendo, it is assumed that "culture" was related to "cultivate."